IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

DAVID H. LEMPERT, Plaintiff, v. SUSAN RICE, U.S. Ambassador to the United Nations, UNITED NATIONS, UNITED NATIONS DEVELOPMENT PROGRAMME, Defendants.	)	Civil Action No. 12-01518 (CKK)

REPLY IN SUPPORT OF STATEMENT OF INTEREST OF THE UNITED STATES OF AMERICA

INTRODUCTION

Pursuant to 28 U.S.C. § 517, the United States of America respectfully submits this reply in further support of its Statement of Interest, which was filed in response to the Court's request for the United States' views on whether the United Nations ("UN") is immune from suit in this action. *See* Statement of Interest of the United States (ECF No. 18). Plaintiff contends that the UN and the UN Development Programme ("UNDP") breached his alleged employment contract and committed the torts of fraud and harassment. As explained in the Government's Statement of Interest, Plaintiff's lawsuit should be dismissed because the UN Defendants are immune from suit under the Convention on Privileges and Immunities of the United Nations.

Plaintiff's Response to the Government's Statement of Interest, ECF No. 22, and his Opposition to Ambassador Rice's Motion to Dismiss, ECF No. 20, present a number of baseless arguments in support of his contention that the UN is not immune from suit. Below, the United States responds to Plaintiff's arguments that the UN has impliedly waived its immunity under the General Convention by not providing settlement procedures that Plaintiff deems to be adequate; that the UN is required to submit to service, answer the allegations in his Complaint, and provide

"sworn testimony"; that the International Organizations Immunities Act and the Foreign Sovereign Immunities Act limit the UN's immunity in commercial cases; and, finally, that the UN's actions violate the due process requirements of the U.S. Constitution. Consistent with the Government's interest in defending its treaty obligations, the United States respectfully submits that the UN is immune from suit and that the Court should dismiss Plaintiff's lawsuit against the UN for want of jurisdiction pursuant to Federal Rule of Civil Procedure 12(b)(1).

I. The UN Is Immune From "Every Form of Legal Process" Under the General Convention Unless The UN Itself Expressly Waives Its Own Immunity.

Plaintiff repeatedly, and mistakenly, argues that the UN's immunity is qualified, and further that the UN has somehow impliedly or constructively waived its immunity. *See, e.g.*, Opp. to SOI at 6, 13. That is not the case. The Convention on Privileges and Immunities of the United Nations, *adopted* Feb. 13, 1946 21 U.S.T. 1418, 1 U.N.T.S. 16 ("General Convention"), plainly states that "[t]he United Nations, its property and assets wherever located and by whomsoever held, shall enjoy immunity from every form of legal process except insofar as in any particular case it has expressly waived its immunity." General Convention, art. II, sec. 2 (emphasis added). The U.S. Government[1] and an unbroken line of U.S. judicial decisions have interpreted this language to mean precisely what it says: namely, that the UN, including the UNDP, is absolutely immune from all legal process unless the UN, and the UN alone, "expressly" waives its immunity in a particular case. *See Boimah v. United Nations General Assembly*, 664 F.Supp. 69, 71 (E.D.N.Y.1987) ("Under the [General] Convention the United

[1] The Government's interpretation of the General Convention is entitled to deference. *See Kolovrat v. Oregon*, 366 U.S. 187, 194 (1961) ("While courts interpret treaties for themselves, the meaning given them by the departments of government particularly charged with their negotiation and enforcement is given great weight.").

Nations' immunity is absolute, subject only to the organization's express waiver thereof in particular cases."); *Brzak v. United Nations*, 551 F. Supp. 2d 313, 318 (S.D.N.Y. 2008) ("[W]here, as here, the United Nations has not waived its immunity, the General Convention mandates dismissal of Plaintiffs' claims against the United Nations for lack of subject matter jurisdiction."), *aff'd*, *Brzak v. United Nations*, 597 F.3d 107, 112 (2d Cir. 2010); *Sadikoglu v. UN Development Programme*, No. 11-Civ-0294 (PKC), 2011 WL 4953994 at * 3 (S.D.N.Y. Oct. 14, 2011) (ruling that "because UNDP — as a subsidiary program of the UN that reports directly to the General Assembly — has not waived its immunity," the General Convention "mandates dismissal . . . for lack of subject matter jurisdiction"); *see also* SOI at 4-5. Therefore, because the UN has not waived its immunity, Plaintiff's suit against the UN should be dismissed.

Ignoring the clear language of Article II, Section 2 of the General Convention, Plaintiff contends that the General Convention provides only qualified immunity for the UN. *See, e.g.*, Response to SOI at 12; Opp. to MTD at 22-23. Specifically, he argues that, pursuant to Section 29 of the General Convention, the UN's alleged failure to provide an adequate settlement mechanism for his contract dispute has resulted in a constructive waiver of the UN's immunity. *Id*. Plaintiff is mistaken. Section 29 merely requires the UN to "make provisions for appropriate modes of settlement of disputes arising out of contracts or other disputes of a private law character to which the United Nations is a party." General Convention, art. VIII, sec. 29(a). "[N]othing in this section," however, "or any other portion of the [General Convention] refers to or limits the UN's absolute grant of immunity as defined in article II [of the General Convention] — expressly or otherwise." *Sadikoglu*, 2011 WL 4953994 at *5. For this reason, the United States District Court for the Southern District of New York ruled in the *Sadikoglu* case, which

also involved a contract dispute, that "any purported failure of UNDP to submit to arbitration or settlement proceedings does not constitute a waiver of its immunity." *Id.* Similarly, the Second Circuit in *Brzak* rejected the argument "that purported inadequacies with the United Nations' internal dispute resolution mechanism indicate a waiver of [ ] immunity[;] crediting this argument would read the word 'expressly' out of the [General Convention]." *Brzak*, 597 F.3d at 112. As these decisions demonstrate, when the UN does not expressly waive its own immunity in a particular case, as it has not done here, then it is immune under the General Convention "from every form of legal process[,]" General Convention, art. II, sec. 2, including this lawsuit. In any event, the fact that Plaintiff has not been able to resolve his dispute with the UN does not establish that the UN's dispute resolution mechanisms are inadequate. Further, the UN has stated that it has had extensive discussion with Plaintiff concerning his grievances and remains open to continued discussions. *See* February 26, 2013 Letter from Patricia O'Brien, Under-Secretary-General for Legal Affairs, to Ambassador Rice (Exhibit A).

Plaintiff incorrectly asserts that the Secretary-General has a duty to waive the UN's immunity under the General Convention. Opp. to MTD at 24-25; Resp. to SOI at 11. In support, he quotes from Article 20 of the General Convention, which states that the Secretary-General "shall have the right and the duty to waive the immunity of <u>any official</u> in any case where, in his opinion, the immunity would impede the course of justice and can be waived without prejudice to the interests of the United Nations." Resp. to SOI at 11 (quoting General Convention, art. V, sec. 20). This section addresses the Secretary-General's authority to waive the immunity of UN

officials, rather than the UN itself, and is clearly discretionary.[2] In addition, the waiver concerning the UN's own immunity does not set forth any "duty" of the Secretary-General. As recognized in the numerous cases cited above, the UN's immunity is absolute, subject to only express waiver by the UN itself, which has not occurred here.

II. Because The UN Is Immune, Plaintiff Is Mistaken That The UN Is Required To Submit To Service Of Process, Answer Plaintiff's Complaint Or Provide Sworn Testimony.

Plaintiff argues that the UN has failed to provide "good cause" for refusing to submit to service of process, Resp. to SOI at 9, and that the UN is obligated to answer his Complaint and provide sworn testimony in response to his allegations, *id*. at 7-8. Plaintiff's position is at odds with every U.S. judicial decision addressing the UN's immunity under the General Convention.

The General Convention's extension of the UN's immunity to "every form of legal process" quite clearly includes service of process. *See Askir v. Boutros-Ghali*, 933 F. Supp. 368, 369 (S.D.N.Y. 1996) (dismissing suit against UN on the basis of immunity where plaintiff sought an order directing the U.S. Marshal to serve the UN). Nor is there any requirement for the UN to answer Plaintiff's Complaint, provide sworn testimony, or take any other affirmative steps in order to enjoy immunity from suit. Under Article II, Section 2 of the General Convention, unless the UN affirmatively waives its immunity from suit in a particular case, it is absolutely immune. Here, there are no allegations and no evidence whatsoever that the UN has waived its immunity. *See, e.g.*, *De Luca v. United Nations Org.*, 841 F. Supp. 531, 533

[2] It is apparent from the language of this section of the General Convention, in particular the use of the phrase "in his opinion," that the Secretary-General's decision concerning the immunity of UN officials is entirely discretionary. *Cf. Drake v. FAA*, 291 F.3d 59, 70 (D.C. Cir. 2002) (decision expressly left open to the "opinion" of an administrator is committed to agency discretion by law" and thus excluded from review under the Administrative Procedure Act).

(S.D.N.Y.1994) ("Plaintiff has not alleged that the U.N. has expressly waived its immunity in this instance and no evidence presented in this case so suggests. Finding the U.N. to be immune from plaintiff's claims, we dismiss them.").[3]

Furthermore, the United Nations in fact has expressly invoked its immunity and has requested that the United States take steps to protect its immunity in this litigation. *See* SOI at 4 (citing February 26, 2013 Letter from Patricia O'Brien, Under-Secretary-General for Legal Affairs, to Ambassador Rice (Exhibit A) ("[W]e wish to advise that the United Nations expressly maintains its privileges and immunities" with respect to plaintiff's lawsuit, and that "we respectfully request the Government of the United States to take the appropriate steps to ensure that the privileges and immunities of the United Nations are maintained in respect of this legal action.")). Because the UN has not expressly waived its immunity, but, to the contrary, has expressly invoked its immunity, dismissal is clearly warranted. *See Brzak*, 551 F. Supp. 2d at 318 ("[W]here, as here, the United Nations has not waived its immunity, the General Convention mandates dismissal of Plaintiffs' claims against the United Nations for lack of subject matter jurisdiction.").

III. Plaintiff Is Wrong That The UN's Immunity Is Governed By The International Organizations Immunities Act, Or That This Statute Incorporates A "Commercial Activities Exception" to Immunity.

Plaintiff argues that the UN's immunity is governed by the International Organizations Immunities Act of 1945 ("IOIA), 22 U.S.C. §§ 288 *et seq*., and that this statute, through the

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[3] Contrary to Plaintiff's assertion, Resp. to SOI at 21, *De Luca* does not support plaintiff's position. In *De Luca*, the court dismissed the suit against the UN with prejudice even though the plaintiff had "leveled some rather serious charged against both the UN and the individual defendants . . . ." 841 F. Supp. at 535.

Foreign Sovereign Immunities Act of 1976 ("FSIA"), 28 U.S.C. §§ 1330, 1602 *et seq*., creates a "commercial activities exception" that precludes the UN from enjoying immunity in a contract dispute. *See* Resp. to SOI at 9-10; Opp. to MTD at 25-26. This argument is wrong for at least two reasons. First, as the United States explained in its Statement of Interest, the UN is immune pursuant to the General Convention; therefore, its immunity from suit is not dependent upon any immunity that may also be provided by the IOIA. *See* SOI at 6 (citing *Brzak*, 597 F.3d at 112) ("[W]hatever immunities are possessed by other organizations [under the IOIA], the [General Convention] unequivocally grants the United Nations absolute immunity without exception."); *Sadikoglu*, 2011 WL 4953994 at *4 (rejecting argument that the IOIA limits the immunity of the UNDP because the UNDP's immunity derives from the General Convention). This is a clear case of the specific applicability of the General Convention to the UN trumping the general applicability of the IOIA to international organizations.

Second, the D.C. Circuit has squarely rejected the argument that the IOIA incorporates a commercial activities exception to immunity. *Atkinson v. Inter-American Development Bank*, 156 F.3d 1335, 1340-1 (D.C. Cir. 1998). In *Atkinson*, the Court held that the immunity provided by the IOIA is "absolute" and subject only to limitation by Executive Order. *Id*. at 1341. In short, the D.C. Circuit has determined that the IOIA does not incorporate a commercial activities exception; moreover, that question has no bearing on whether the UN is immune under the General Convention, which it clearly is given the lack of an express waiver by the UN.

The cases cited by Plaintiff fail to support his claim that the UN is not immune in cases involving commercial disputes. Specifically, he cites a D.C. Circuit decision that addressed whether the International Finance Organization was immune under the IOIA, where the

organization expressly waived its immunity from suit in its charter document. Resp. to SOI at 15 (citing *Osseiran v. International Finance Corp*., 552 F.3d 836, 838-39 (D.C. Cir. 2009)). This case did not address and has no relevance to whether the UN is immune under the General Convention. Plaintiff also relies on a Third Circuit decision holding that the IOIA, via the FSIA, incorporates a commercial activities exception to immunity. Resp. to SOI at 15 (citing *Oss Nokalva, Inc. v. European Space Agency*, 617 F.3d 756, 766 (3rd Cir. 2010)). Not only is this ruling directly contrary to the D.C. Circuit's *Atkinson* decision, 156 F.3d at 1341, *see supra*, the case did not address nor did it imply that the UN's immunity is anything but absolute under the General Convention.

In contrast to Plaintiff's arguments to the contrary, the United States has offered clear support in its Statement of Interest for the proposition that the UN is immune under the General Convention in all classes of cases, including breach of contract claims. *See* SOI at 5-6 (citing *Sadikoglu*, 2011 WL 4953994 at *2-3 (finding UNDP immune under General Convention with respect to breach of contract claim)).

Plaintiff also erroneously argues that, because the President may waive an international organization's immunity under the IOIA, Ambassador Rice has the power to waiver the UN's immunity. Opp. to MTD at 20-21. Again, this argument fails to recognize that the UN is immune pursuant to the General Convention, and that under the General Convention only the UN may waive its own immunity. General Convention, art. II, sec. 2.

IV. The UN Is Not Subject To The Due Process Requirements Of The United States Constitution.

Finally, Plaintiff claims that the UN does not enjoy immunity from suit because he has alleged that he is entitled under the Due Process Clause of the Fifth or Fourteenth Amendments

to have his claims against the UN heard.[4] *See, e.g.*, Resp. to SOI at 8. Unsurprisingly, Plaintiff offers no authority or case law in support of his claim. It is beyond dispute that the United Nations is not subject to the due process requirements of the United States Constitution. *See, e.g., McGehee v. Albright*, 210 F. Supp. 2d 210, 216 n.4 (S.D.N.Y. 1999) (noting that the United Nations "is not subject to the due process requirements of the United States Constitution"). Moreover, to the extent Plaintiff is arguing that the UN's immunity from suit violates his right to due process, that argument was rejected conclusively in *Brzak*, where the Second Circuit stated, with equal applicability here: "If appellants' constitutional argument were correct, judicial immunity, prosecutorial immunity, and legislative immunity, for example, could not exist. Suffice it to say, they offer no principled arguments as to why the continuing existence of immunities violates the Constitution." 597 F.3d at 114. Therefore, absent an express waiver in a particular case, the UN is immune from all lawsuits in U.S. Courts, presenting any type of legal claim, including claims purportedly brought under the Constitution.

CONCLUSION

For the reasons stated above and in the United States' Statement of Interest, the UN, including the UNDP, enjoys absolute immunity, and the Court therefore lacks subject matter jurisdiction over this action against the UN Defendants.

[4] Plaintiff apparently confuses procedural due process with substantive due process, since he argues that the UN's actions relating to his employment grievance are subject to "strict scrutiny," which is the standard for U.S. Governmental actions that infringe upon fundamental rights. Resp. to SOI at 14. In contrast, the standards for assessing whether U.S. governmental actions deny procedural due process with respect to property interests are set forth in *Mathews v. Eldridge*, 424 U.S. 319, 341-48 (1976). Of course, as noted above, the UN is not subject to either the procedural or substantive requirements of the Due Process Clause.

Dated: June 10, 2013

Respectfully submitted,

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CERTIFICATE OF SERVICE

I, Nicholas Cartier, counsel of record for the Defendant, hereby certify that on June 10, 2013, I placed a copy of the foregoing in the mail in a prepaid envelope to the following person and address: "David H. Lempert, c/o Walter Schwartz, 110 Crestview Place, Ardsley, NY 10502."